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No. 90-1835

Supreme Court, U.S.
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IN THE
Supreme Court of the United States
OCTOBER TERM, 1990

RUST ENGINEERING COMPANY,
Petitioner,
v.

FRANK CAMPBELL,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

In ADEA, 29 U.S.C. §§ 629, *et seq*, cases where a jury has been demanded, once the Court decides that reinstatement is not appropriate or feasible, and after the Court decides that front pay is an appropriate consideration, should this Court establish a hard and fast rule that the amount of front pay, if any, should be decided by the Court or by the jury?

TABLE OF CONTENTS

Question Presented for Review	i
Table of Authorities	iii
Statement of the Case	2
Argument	3
Conclusion	6

TABLE OF AUTHORITIES

Cases	Page
Cassino v. Reichhold Chemicals, Inc., 817 F.2d 1338 (9th Cir. 1987), *cert. denied*, 484 U.S. 1047 (1988)	6
Castle v. Sangamo Weston, Inc., 837 F.2d 1550 (11th Cir. 1988)	6
Coston v. Plitt Theatres, Inc., 831 F.2d 1321 (7th Cir. 1987), *cert. denied*, 485 U.S. 1007 (1988), *vacated on other grounds*, 486 U.S. 1020 (1988), *on remand*, 860 F.2d 834 (7th Cir. 1988)	5
Davis v. Combustion Engineering, Inc., 742 F.2d 916, 922-23 (6th Cir. 1984)	4,5,7
DeLoach v. Delchamps, Inc., 897 F.2d 815 (5th Cir. 1990)	5
Dominic v. Consolidated Edison Co. of New York, Inc., 822 F.2d 1249 (2d Cir. 1987)	5
Duke v. Uniroyal, Incorporated, 928 F.2d 1413 (4th Cir. 1991)	5
EEOC v. Prudential Federal Savings & Loan Ass'n, 763 F.2d 1166 (10th Cir.), *cert. denied*, 474 U.S. 954 (1985)	6

Fite v. First Tennessee Protection Credit Ass'n, 861 F.2d 884 (6th Cir. 1988) 5,6

Gibson v. Mohawk Rubber Co., 695 F.2d 1093 (8th Cir. 1982) . . . . . 5,7 (note 6)

Graefenhain v. Pabst Brewing Co., 870 F.2d 1198 (7th Cir. 1989) 5

Hansard v. Pepsi-Cola Metropolitan Bottling Company, Inc. 856 F.2d 1461, 1470 (5th Cir.), *cert. denied* --- U.S. ---, 110 Supreme Court 129 (1989) 5

Hybert v. Hearst Corp., 900 F.2d 1050 (7th Cir. 1990) 5

Lorillard v. Pons, 434 U.S. 575 (1978) 2

Maxfield v. Sinclair International, 766 F.2d 788 (3d Cir. 1985), *cert. denied*, 474 U.S. 1057 (1986) 5

Ramsey v. Chrysler First, Inc., 861 F.2d 1541 (11th Cir. 1988) 6

Schrand v. Federal Pacific Electrical Co., 851 F.2d 152 (6th Cir. 1988) 5

Wildman v. Lerner Stores Corp., 771 F.2d 605 (1st Cir. 1985) 4

U.S. Statutes

29 U.S.C. § 626(b) . . . . . 5 (note 4)

29 U.S.C. § 626(c)(1) . . . . . 5 (note 4)

29 U.S.C. § 626(c)(2) 2

29 U.S.C. §§ 629 *et seq.* 2

Other Authorities

Age Discrimination in Employment, 74 ALR Fed 745 6

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To the Honorable, the Chief Justice, and the Associate Justices of the Supreme Court of the United States:

Frank Campbell, the Respondent, respectfully prays that the Petition for Writ of Certiorari, to review the Order of the United States Court of Appeals for the Sixth Circuit that was entered on March 1, 1991, be denied.

STATEMENT OF THE CASE

Respondent, Frank Campbell, Plaintiff below, initially brought this action under the ADEA, 29 U.S.C. §§ 629 *et seq.*, alleging that Rust Engineering Company, Inc., his former employer, Defendant below, had discriminated against him on account of his age when he was replaced with a twenty-four year old and laid off at age fifty-five. Respondent demanded and received a jury trial.[1] Respondent was in the Financial Management department of the Petitioner at the time of his layoff. He sought back pay, benefits, liquidated damages, and reinstatement, or in the alternative, front pay.

In this case, the Petitioner raised six grounds on appeal in the Court of Appeals and now would have this Court review one of the claims.[2] The Magistrate specifically rejected

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[1] The right to a trial by jury in an ADEA action is now established by statute. See 29 U.S.C. § 626(c)(2). See also *Lorillard v. Pons*, 434 U.S. 575 (1978): "We are therefore persuaded that Congress intended that in a private action under the ADEA a trial by jury would be available where sought by one of the parties." *Id.*, p. 585.

[2] In the Sixth Circuit, Petitioner raised the following grounds on appeal: (1) the magistrate erred when he denied defendant's motion for a judgment notwithstanding the verdict (JNOV) with regard to both of plaintiff's claims; (2) the magistrate erred in denying defendant's motion for JNOV with regard to plaintiff's claim for liquidated damages under the ADEA; (3) the magistrate erred when he submitted the question of front pay to the jury, rather than retaining it as a question for the court; (4) the magistrate erred when he denied defendant's motion for a new trial on the basis that the award of front pay was excessive or, in the alternative, erred in not ordering a remittitur reducing this damage award; (5) the magistrate erred when he admitted into evidence a statement by the plaintiff's supervisor; and (6) the magistrate erred when he denied defendant's motion (continued...)

reinstatement as being appropriate prior to allowing the jury to consider what, if any, front pay would be awarded.[3] It should be noted and emphasized that the Petitioner has not questioned the adequacy of the Court's jury instructions on the issue of front pay.

In this case, an economist testified for Respondent on the issue of damages, and, of course, reduced the amount to present value. The Petitioner did not use an expert. The Magistrate denied Petitioner's Motion for Remittitur on the issue of front pay finding that the amount of front pay awarded was within the range of reasonableness.

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[2](...continued)
for a JNOV on plaintiff's claim under Tennessee law and also when he refused to grant defendant's motion for a new trial on this issue.

[3] The Magistrate, in holding that reinstatement was not appropriate, made the following finding:

> "... the Plaintiff's prospects for re-employment with Rust appear to be somewhat dim because he was dismissed based on their assertion that he has an attitude problem. He has less than a high school diploma. He is now fifty-seven years old. He has searched for a job. He has found one, but there are no fringe benefits with that job and no promise of a continuity of employment." (Magistrate Murrian, transcript of the record 3/66-67)

ARGUMENT

The Respondent respectfully submits that this petition should be denied in that there are no special or important reasons for the granting of the writ. The Petitioner asserts that this Honorable Court should grant the Writ in order to establish a hard and fast rule that the trial Court, and not the jury, should quantify the amount of front pay awarded, if any, after the Court determines that reinstatement is not appropriate or feasible, and after the Court determines front pay is an appropriate remedy in fashioning relief. The Respondent would respectfully submit that there is no special or important reason to grant the Writ, since the Petitioner acknowledges in its brief that there is no conflict between the Circuits on the availability of front pay as a remedy and there is no conflict between the Circuits on the issue of who decides if reinstatement or front pay, if any, is appropriate.

The Petitioner asserts that there is a major conflict among the Circuits with regard to the question of whether the "quantification" of front pay is for the court to decide or for the jury to decide. The Respondent would respectfully submit that the alleged "conflict" on who decides the amount, if any, is without significance, because the Circuits have all held, either expressly or by strong implication, that the issue of reinstatement versus front pay is a matter within the sound discretion of the trial court in fashioning relief.[4] See, *Wildman*

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[4] For example, the Sixth Circuit, in *Davis v. Combustion Engineering, Inc.*, 742 F.2d 916, 923 (6th Cir. 1984), cited the applicable statute and concluded as follows:

(continued...)

v. Lerner Stores Corp., 771 F.2d 605, 616 (1st Cir. 1985); *Dominic v. Consolidated Edison Co. of New York, Inc.*, 822 F.2d 1249, 1258 (2d Cir. 1987); *Maxfield v. Sinclair International*, 766 F.2d 788, 795-797 (3d Cir. 1985), *cert. denied*, 474 U.S. 1057 (1986); *Duke v. Uniroyal, Incorporated*, 928 F.2d 1413, 1429 (4th Cir. 1991); *DeLoach v. Delchamps, Inc.*, 897 F.2d 815, 822 (5th Cir. 1990); *Hansard v. Pepsi-Cola Metropolitan Bottling Company, Inc.* 856 F.2d 1461, 1469 (5th Cir.), *cert. denied* --- U.S. ---, 110 Supreme Court 129 (1989); *Davis v. Combustion Engineering, Inc.*, 742 F.2d 916, 932 (6th Cir. 1984); *Fite v. First Tennessee Protection Credit Ass'n*, 861 F.2d 884, 892 (6th Cir. 1988); *Schrand v. Federal Pacific Electrical Co.*, 851 F.2d 152, 158 (6th Cir. 1988); *Coston v. Plitt Theatres, Inc.*, 831 F.2d 1321, 1332 (7th Cir. 1987), *cert. denied*, 485 U.S. 1007 (1988), *vacated on other grounds*, 486 U.S. 1020 (1988), *on remand*, 860 F.2d 834 (7th Cir. 1988); *Graefenhain v. Pabst Brewing Co.*, 870 F.2d 1198, 1205 (7th Cir. 1989); *Hybert v. Hearst Corp.*, 900 F.2d 1050, 1056 (7th Cir. 1990); *Gibson v.*

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[4](...continued)

"'In any action brought to enforce this chapter the court shall have jurisdiction to grant *such legal or equitable relief as may be appropriate to effectuate the purposes of this chapter*, including *without limitation* judgments compelling employment, reinstatement or promotion, or enforcing the liability for amounts deemed to be unpaid minimum wages or unpaid overtime compensation under this section.' 29 U.S.C. § 626(b) (emphasis added [in original]).

"In addition, subsection (c) provides in part,

"'Any person aggrieved may bring a civil action in any court of competent jurisdiction for *such legal or equitable relief as will effectuate the purposes of this chapter.*' 29 U.S.C. § 626(c)(1) (emphasis added [in original]). In light of this language, we hold that front pay is a remedy available to the trial court for use, in its discretion, in fashioning relief."

Mohawk Rubber Co., 695 F.2d 1093, 1100 (8th Cir. 1982); *Cassino v. Reichhold Chemicals, Inc.*, 817 F.2d 1338, 1347 (9th Cir. 1987), *cert. denied*, 484 U.S. 1047 (1988); *EEOC v. Prudential Federal Savings & Loan Ass'n*, 763 F.2d 1166, 1171-1173 (10th Cir.), *cert. denied*, 474 U.S. 954 (1985); *Castle v. Sangamo Weston, Inc.*, 837 F.2d 1550, 1561 (11th Cir. 1988); and *Ramsey v. Chrysler First, Inc.*, 861 F.2d 1541, 1545 (11th Cir. 1988).[5] Since the remedy is discretionary, the Respondent would respectfully submit that the "hard and fast" rule sought by the Petitioner is not necessary.

The Petitioner argues that there are three different views emerging from the various Circuits on the issue of who quantifies an award of front pay, but Petitioner admits there is consensus on the important issue of the availability of front pay as a remedy and on the important issue of who decides if front pay is an appropriate remedy. The Petitioner asserts that the decisions of the First, Second, Fourth, Fifth, Eight and Eleventh Circuits hold that front pay is an "equitable remedy", and that the amount of front pay to be awarded is a question for the Court. Petitioner argues that the Seventh and Tenth Circuits apparently agree with the rationale of these decisions. Petitioner asserts that the opposite view is represented by the decisions of the Third and Ninth Circuits, which, Petitioner states, expressly hold that front pay is a legal remedy, and that the amount of front pay to be awarded is a question for the jury. The Petitioner argues that the Sixth Circuit holds that whether front pay is quantified by the Court or the jury is a question that lies within the discretion of the trial judge. Examination of the opinions reveals that there is clear consensus between the Circuits that the issue of reinstatement versus front pay is for the Court to decide. See *Fite v. First*

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[5] See generally, *Age Discrimination in Employment*, 74 ALR Fed 745.

Tennessee Protection Credit Ass'n, 861 F.2d 884 (6th Cir. 1988). The Respondent would submit that reinstatement and front pay should not be subject to a per se rule, but will depend on the facts and circumstances of the individual case.[6] The respondent would respectfully submit that the "conflict" on whether the Court or jury quantifies the amount, if any, is not significant because there is agreement throughout the Circuits on the availability of front pay and there is agreement throughout the Circuits that the trial court must first make a determination on the feasibility or practicality of reinstatement. There is also agreement throughout the Circuits that reinstatement versus front pay, if any, is discretionary with the Court. There is no issue in this case that the Trial Court's jury instructions on front pay were erroneous, and as to the factual question of the amount of front pay, if any, even if a jury quantifies it initially, the trial judge still retains power to review the amount as it did and as the Court of Appeals did in the case at hand.

The Petitioner also argues that besides the alleged "conflict" in the Circuits, that the second reason for granting the petition involves Court's Rule 10.1(c). The Petitioner asserts that whether the court or the jury decides the amount of front pay to award is a question of "fundamental importance" in the administration of the ADEA. However, Petitioner cites no evil

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[6] In *Davis v. Combustion Engineering*, 742 F.2d 916, 923 (6th Cir. 1984), the Court concluded:

> "We join the Eighth Circuit in concluding that the purpose of the Act is to make people whole and that which makes people whole is a matter for the discretion of the trial court under the facts and circumstances of the individual case. See, *Gibson, supra*, at 1097, 1101." [*Gibson v. Mohawk Rubber Co.*, 695 F.2d 1093, 1100 (8th Cir. 1982).]

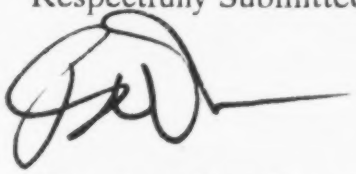
from the practice of allowing a jury to decide the amount, because the Court will first decide if front pay is an appropriate remedy, the Court will instruct the jury on the law to apply, and the Court will maintain supervisory power over the amount of the award.

WHEREFORE, the Respondent would respectfully pray for the Writ of Certiorari to be denied.

CONCLUSION

For the reasons set forth in this brief, the Respondent would respectfully pray for the petition to be denied.

Respectfully Submitted,



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